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## ESSAY

# THE PROBLEMS OF FEDERALISM IN THE FORMER SOVIET UNION: THE PARALLELS WITH PRE-CIVIL WAR AMERICA

*Igor Grazin\**

"Asked for his prognosis for events in the Baltic republics . . . which are seeking to re-establish independence lost in 1939, [Col.] Alksnis said: 'Civil war.'"

The statement itself is a revealing one. Let us hope that Colonel Victor Alksins, then the Peoples' Deputy of the U.S.S.R. and one of the leaders of the right wing in the Soviet parliament, is wrong. Although I cannot be sure of what he meant, some parallels between the problems of federalism in the Soviet Union during the late-20th century, and the United States during the mid-19th-century, were fairly evident. It is not accidental that Jeff Trimble and Douglas Stanglin saw the similarities between Gorbachev and Lincoln and commented that both leaders had "to struggle to hold together a union that is split."<sup>2</sup> No military similarities exist, and even the political ones are fairly vague. The problems of federalism in general, however, and the ways of resolving these problems may be of some intellectual interest.

Here, I have to make a confession. Although I have written several papers on federalism in the Soviet Union, I am not very familiar with the history of the American Civil War. It was Professor Robert Rodes, of the Notre Dame Law School, who first pointed me towards the very existence of such similarities and recommended that I investigate Bruce Catton's "The Coming Fury."<sup>3</sup> To avoid the discussions that may arise from different evaluations of different sources on the American Civil War, I intend to restrict my historical references to that particular work.

Even though several astonishing parallels between particular events may be found, the political statements and personal behavior of political leaders are the scope of this paper. From the similarities between certain instances, I do not want to conclude that the consequences will also be similar. It is not only my hope that the consequences will be different and there will not be a Civil War in the late-20th century in what was once the Soviet Union, but it is also my firm conviction that history never repeats itself exactly and that there is a place for free human will between the generally strong links in the chain of social causes and results. The human will is what is able to create some new consequences, and avoid old ones.

What I will examine is not the semblance of incidence but the set of problems connected with the contradictory character of federalism which may remain in

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1. Thom Shanker, *Baltic Furor to Spur Civil War*, CHICAGO TRIBUNE, Jan. 28, 1991, at 1.
2. *The Last Hurrah*, U.S. News, Nov. 19, 1990, at 36.
3. BRUCE CATTON, *THE COMING FURY* (1976).

force until the federal structure of states exists. The very existence of parallels which manifest themselves despite differences in time (one half of a century), space (North America and Europe), and political regimes (democracy and totalitarianism) serve as proof of the relative stability of such problems and the possibility of learning how to avoid them from previous experience.

### I. COMPETING SOVEREIGNTIES

Immediately after a federation is formed, the first controversy which appears is who has the responsibility of protecting the political and legal rights of the constituent states that form the federation. It is not the problem of protecting the rights of people or individuals because they are protected (if they are!) or violated by the unitary state. It is not the problem of the sovereignty of the federal state as a whole because its pretensions of sovereignty are, in principal, similar to those of a unitary state. What makes a federal state different from a unitary one is that its subdivisions possess certain rights, not as purely administrative units, but as some kind of states.

Prior to the Civil War, the controversy was not a problem for the United States under the Articles of Confederation since Article two provided that "each state retains its sovereignty."<sup>4</sup> It has ceased to be a problem after the Civil War, since the states' sovereignty as expressed in the Tenth Amendment has not been interpreted as anything more than a mere *division* of jurisdiction between the Federal Government and the States. It was the problem, however, on the eve of Civil War. At this time, the sovereignty of states could be interpreted as something that could compete with the sovereignty of federal powers. The situation in the late U.S.S.R. was almost identical. The Soviet Union's last Constitution includes articles that dim rather than clarify the problem.

According to article 76 "a Union Republic is a sovereign Soviet socialist state."<sup>5</sup> Article 76 was expressly supported by article 72 which states that "each Union Republic shall retain the right freely to secede from the U.S.S.R." and implicitly supported by article 78 which provides that "[t]he territory of Union Republic may not be altered without its consent."<sup>6</sup> Moreover, article 80 held that "[a] Union Republic has the right to enter into relations with other states, conclude treaties with them, exchange diplomatic and consular representatives, and have part in the mark of international organizations."<sup>7</sup> These clauses evidently revealed the sovereignty of a republic in the Soviet Union. In contrast, contradictory clauses may also be found. For example, article 75 stated that "the sovereignty of the U.S.S.R. extends throughout its territory,"<sup>8</sup> and article 74 explained that "in the event of a discrepancy between a Union Republic law and All-Union law, the law of the USSR shall prevail."<sup>9</sup>

It may be argued that the sovereignty of the federation did not contradict the sovereignties of republics and only complimented them when necessary. If

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4. *ARTICLES OF CONFEDERATION*, art. 2.

5. KONST. SSSR (Oct. 7, 1977), in 28 *CONSTITUTIONS OF THE COUNTRIES OF THE WORLD* (Albert P. Blaustein & Gilbert H. Flanz eds., (1991)).

6. *Id.* at art. 78.

7. *Id.* at art. 80.

8. *Id.* at art. 75.

9. *Id.* at art. 74.

this were the case the federal sovereignty could have extended over the entire territory of the federation without the requirement of first expecting the development of some new problems. Unfortunately, this is not the case.

Article 73 of the Soviet Constitution, which provided for federal jurisdiction, stated that its jurisdiction was actually limitless. The article provided that the federal government controlled the right to handle "all other matters of All-Union importance."<sup>10</sup> More importantly, article 71 provided that "the sovereign rights of Union Republics shall be safeguarded by the USSR."<sup>11</sup> This might be correct in the cases where third parties violated these rights. In both the United States and in the Soviet Union, however, the problem rose from the fact that the rights of the states or republics were violated (or were at least considered to be violated) by the federal powers themselves. In the United States, after the War of 1812, or at least the Mexican War of 1846, and in the Soviet Union after World War II, one cannot trace any real threat for the states or republics other than the threat created by the federal authorities.<sup>12</sup>

Naturally, in the United States, one of the many constitutional conflicts was the question of slavery in the southern states. The history of it illustrates that in spite of all its acuteness, it was a question which could have been resolved through traditional political compromise. For example, the Missouri Compromise of 1820 and the Kansas-Nebraska Act of 1854 illustrate compromises which, although they did not exclude the existing tensions, restrained them at least in the framework of "normal" political struggle.<sup>13</sup>

Besides that, slavery had fairly firm guarantees in the constitution itself. Both section two of article I of Madison-Ellsworth's compromise (to count five blacks for three whites) and section two of article IV (the fugitive slaves clause) are examples of constitutional guarantees of slavery. Initially, the United States Constitution did not prohibit the certain expansion of slavery.<sup>14</sup> Consequently, the institution of slavery itself could not be the sole cause for the conflict of 1861 and even the election of President Lincoln could be no more than just a motive.

The apparent reason for the constitutional conflicts in the Soviet Union is the development of nationalism which splits the federal Soviet state into smaller national-territorial political units. Again, this may be considered as nothing more than a mere motive or emotional impact force rather than a real reason or cause for the conflict.

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10. The proof of "all-union importance" of every given case is a matter of legal or propagandistic technique, no more.

11. See *supra* note 9.

12. The reasons behind the constitutional conflicts were so complex that I do not have here any chance to deal with them in detail.

13. It is necessary to accentuate a fact that is generally known but still often forgotten: the Republican leaders of the United States in the mid-19th century were not opposed so much to slavery itself, as to its expansion coupled with the political expansion of Southern States. Consequently, they were not so much class-fighters against slavery, but instead men who "disliked [slavery] mainly because they saw blacks as less than human, somehow not nice to have around." C. COLLIER AND J.L. COLLIER, *DECISION IN PHILADELPHIA* 141 (1986). Lincoln himself favored, to put it in Catton's words, to have the slave "to be deported as soon as he lost his chains" CATTON, *supra* note 3, at 86.

14. U.S. CONST. Art. I § 9. The expansion of slavery was not prohibited until 1808.

What underlies these motives is the conflict created by the very idea of federalism and the understanding of subjects' rights under the federation. The fact is that in both cases the federation that presumably had to work in the interests of *all* of its subjects actually started to work in favor of some of them or in favor of itself.

It is neither fair nor justified to look for selfish reasons for that situation. Objectively, however, the federal policy of taxation, land use and finances, while favorable to the industrial North, was much less favorable to the South. Properly understood, federalism, while even protecting Southern slavery, represented the interests of the North. Furthermore, the anti-slavery laws which were passed by Vermont, Massachusetts and other states and which provided freedom to the fugitive slaves not only violated the Constitution, but were also politically hostile to the Southern states. The federal policy which was formally intended to be the policy for the entire Union was actually the policy for only one half of it.

The same problem was found in much more drastic measures in the Soviet Union. The Soviet Union's totalitarian and state-controlled economy was equally destructive to all republics. Traditional Soviet federalism favored the class of party-bureaucratic apparatus and military-industrial complex whose very existence was totally dependent on the preservation of the Union. The system of constant and uncompensated alienation of goods from their producers made everybody economically dependent on the existing authorities.<sup>15</sup> The dependency on federal powers was one of the dangers for the society which wanted to protect and preserve liberal<sup>16</sup> principles and values. In this sense Milton Friedman explained the following: "Government power must be dispersed. If government is to exercise power, better in the county than in the state, better in the state than in Washington."<sup>17</sup>

Generally, these differences did not undermine the similarities of the situation. Unlike the Soviet Constitution, the United States Constitution does not include any direct clauses describing the sovereignty of states. Each state's adoption of the United States Constitution proved its sovereignty. In 1854, this idea of state sovereignty was strengthened by the Kansas-Nebraska Act. Overruling the unconditional clauses of the Missouri Compromise, the Act connected acceptance of slavery in the new territories with the popular will of their white inhabitants and created the widely known principle of "popular sovereignty." Despite the similarity between the principle which laid the foundation for United States Constitution "We the People of the United States. . .," and the principle of "popular sovereignty," the Kansas-Nebraska Act clearly stressed the role of the popular will in forming the state's jurisdiction of sovereignty. The words were almost the same but the accents were different; and here it was extremely important.

## II. PROTECTING THE SOVEREIGNTY

Theoretically, both the United States and the Soviet Union were based on the will of the people. It became evident in the course of creating the United

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15. It is as if the federal government in Washington, D.C. had taken away almost all the cotton from the southern states and had given back the industrial goods for the prices determined by itself.

16. Here I refer to "liberal" in its classical meaning.

17. MILTON FRIEDMAN, *CAPITALISM AND FREEDOM* 3 (1982).

States Constitution that "being based on" itself is problematic in the case of a federation. The new federation could be based on the direct will of people, as exercised through the nation-wide elections, or on the will that is mediated by the interim stage of sovereign bodies of the states/republics as immediate subjects to that federation.

Here, it is not simply a question of different compositions of the structures of powers. In failing to clearly express this contradiction, the drafters of the United States Constitution avoided the problem of different compositions of structures of powers. The result was the pre-Civil War constitutional crisis. In the Soviet Constitution the contradiction was fixed *expressis verbis*. Besides the paragraphs on republican sovereignty found in the preamble of the Soviet Constitution, it was stated that "a new historical community of people has been formed - the Soviet people."<sup>18</sup> If this mainly propagandistic statement were true, the federative composition of the Soviet Union could be considered merely as an anachronism. A single political unity needs a single set of supreme political bodies without all of the complications connected with the federal structure of the state. The idea of a single nation of a "new historical unity," contradicts the federative composition of a state and vice versa. The federative composition proves that, even if there is a unified nation, this unity is far from being so absolute that it can ignore fairly considerable regional and national-regional differences between the different parts of a state.

If these differences were incidental and temporary, they would have ceased to exist after a certain amount of time had passed. However, since they were not and since they were constantly reproduced in the sphere of policy and economics, the question of protecting the political forms of expressing these differences remained. Moreover, since when the real composition and practice of the federal government evidently favored unitaristic tendencies and the question of protecting sovereign rights of the states or republics became so urgent that it was almost impossible to solve in the existing framework of constitutional practice, the question of the nature of a federation and of its initial stage arose.

Despite the fact that it is a fairly recent occurrence, the history of the formation of the Soviet Union is rather vague. Because of the conditions of severe censorship on everything that was connected with the first years of Soviet power it is almost impossible to say to what extent the Bolsheviks enjoyed popular support and to what extent their political interests in the unification of the parts of former Russian empire expressed the real will of the people.<sup>19</sup> In contrast to American history, there were no referendums, plebiscites or conventions in the republics to decide the matters of further statehood and unification. Rather, everything was decided by the republican Soviets and was based on a very restricted class-representation without any dependence on the broader popular will.

In spite of those instances, theoretically the Soviet Union was described, until its very end, as the "result of the free self-determination of nations and the voluntary association of equal Soviet Socialist Republics."<sup>20</sup>

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18. *Supra* note 9.

19. The military resistance of Polish, Baltic and Trans-Caucasian people to such a unification can prove the fact that at least not all of the future members of Union wanted to join it.

20. *Supra* note 9, at art. 70.

From a pragmatic point of view, it is trivial that the reason for such a unification is the fact that it serves the interests of people better than their politically independent being. This was stated as follows in the "Declaration on Formation of the USSR" of 1922 and in the preamble of the last Soviet Constitution: "The unification of the Soviet Republics in the Union of Soviet Socialist Republics multiplied the forces and opportunities of the peoples of the country [in the building of socialism]." <sup>21</sup> From the point of view of our present discussion it is similar to the United States Constitution's phrase "in order to form a more perfect Union." <sup>22</sup>

The fact that a Union is created in favor of its subjects and cannot or must not be used against the sovereign bodies is evident and trivial. Unfortunately, it was not so in the pre-War U.S. and it was far from being so in the USSR. In both cases the idea of "nation" or the "people" has been used to strengthen federal powers and destroy the sovereign rights of the states.

In the recently created system of Soviet federal power, (that practically ceased to exist as a result of the abortive coup of August 1991) it had been explicated in the formation of the Congress of People's Deputies as the "supreme organ of USSR state power." <sup>23</sup> The consequence of investing the supreme power in a unicameral body based on proportional representation created the tremendous under-representation of republican interests. The figures for the Congress of People's Deputies were as follows: a total of 2250 deputies composed the Congress of People's Deputies. More than 50 per cent of these deputies came from Russia and the Ukraine. <sup>24</sup>

Congress' right to overrule the bicameral Supreme Soviet or even the simple possibility of entirely avoiding the Supreme Soviet at all by putting the draft for the Congress directly served as a means to annihilate the theoretical rights of the eleven republics. <sup>25</sup>

By different means and methods the same result was achieved in the United States and the Soviet Union. This was under-representation and under-protection of certain republic's or state's rights in the federal composition of power. The question arose of whether the sovereignty of constituent parts ceased to exist

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21. *Supra* note 9.

22. U.S. CONST. pmbl.

23. *Supra* note 9, at art. 108, as amended.

24. Specifically, 1099 deputies were from Russia and 262 from the Ukraine. Together they total 1361 Deputies. Russia, Ukraine plus votes of 108 deputies of Uzbekistan and 95 votes from Kazakhstan) - meant that four major republics had 1568 votes, whereas two thirds of a majority from 2250 is composed of 1475 votes. DAWN MANN, ROBERT MONYAK, AND ELIZABETH TEAGUE, *THE SUPREME SOVIET: A BIOGRAPHICAL DIRECTORY*, 25 (1989).

Here it is necessary to mention that these proportions do not reveal any political consequences because the political parties in the USSR were not identical with the republican divisions. (It is similar to the case of Democratic Party that was also split into pro-Northern and pro-Southern groups.) But this is not our point here. What I wanted to point out here is that the federal composition of the Soviet Union was not taken into account by the composition of its supreme organ. And this induced problems.

25. In December 1989 together with deputy from Lithuania Egidijus Bickauskas we introduced a clause demanding the preliminary adoption of a bill by the Supreme Soviet before it can be put for the vote of Congress (art. 133 of Standing Order of the Congress. . .) but our amendment was watered down by the clause "as a rule" and simply ignored in the most crucial case - the adoption of law on constitutional supervision in the USSR.

after it joined the Union and if it did not, who was responsible for protecting those rights if they were violated?

The Soviet Constitution provided a clear answer. Article 81 stated that "[t]he sovereign rights of Union Republics shall be safeguarded by the USSR."<sup>26</sup> Something similar may be found in section 3, Art. IV of the United States Constitution. The obligation of the federal government was even more clearly expressed by Robert Toombs in a lecture in which he explained that the federal government "is bound to protect and maintain it [slavery] in the States where it [slavery] exists, and wherever its flag floats, and its jurisdiction is paramount."<sup>27</sup>

The problem here is that the violated sovereign rights are protected by the same party who violates them. It contradicts the classic principle: *nemo debet esse iudex in propria causa* - nobody can be a judge in his own case. Whatever the different interests of the constituent parties of a federation may be, this is not a case of these constituent parties but, a case of constituent parties and the federation.

In his description of federalism, Stephen Kux points out "the existence of mechanisms for resolving constitutional conflicts."<sup>28</sup> The problem in reality arose from the fact that, although such mechanisms existed, they really did not provide protection for the rights of sovereign constituent states.

Since the federal mechanisms did not provide the necessary protection, what were the possibilities of a federation's subject to protect itself against the federation if the federation had usurped the sovereignty of its constituent states/republics?

### III. THE OPTIONS OF SETTLEMENT

The first *bona fide* option - that of negotiation and subjection to some form of arbitration is evident. I refer here to the arbitration that constitutes the missing third party, the judge, in the instance of a case involving federation v. constituent. However, after obtaining power which is much stronger than that of the constituents, the federal authority does not lean towards such a solution.

There is no need here to recall all the efforts made by the moderate representatives of the North and South to find political solutions acceptable for both sides in the mid-19th century American conflict. Their efforts were aimed towards the wrong goal. The goal was to settle the problems between the North and South rather than the problems between the South and the Federation. The conflicts between the North and the South (and, for instance, between Russia and Lithuania, Yeltsin and Landsbergis) could have been mediated. Those between Federation and States were irreconcilable. The memorandum presented by the commissioners from South Carolina to President Buchanan aimed at "the continuance of peace and amity between this Commonwealth [South Carolina] and the Government in Washington" was considered by a relatively moderate addressee to be a document "of the most extravagant character" that "was not being thought of."<sup>29</sup> The potential power, political, economic, or military, of the

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26. *Supra* note 9.

27. 1 ALEXANDER H. STEPHENS, CONSTITUTIONAL VIEW OF THE LATE WAR BETWEEN THE STATES 40 (1868).

28. STEPHEN KUX, SOVIET FEDERALISM: A COMPARATIVE PERSPECTIVE 7 (1990).

29. CATTON, *supra* note 3, at 163-164.



federal government and the corresponding political ambitions were so much greater than that of the constituents that a solution based upon equality became improbable. The result in the United States is described by Bruce Catton in the following words:

All of the Confederate government's attempts to establish friendly relations with the United States, and to settle points at issue "upon principles of rights, justice, equity and good faith" had been rebuffed; the government at Washington refused to talk about these things, refused even to listen, and was now mustering troops "to overawe, oppress and finally subjugate" the Southern people.<sup>30</sup>

Even the moderate stance of "neutrality" taken by Maryland<sup>31</sup> was not accepted by the Federal powers because it implied the recognition of sovereign rights to the secessionist South as well.

The similarity between the United States and the Soviet Union is evident. Not to mention the previous proposals of Baltic deputies in the federal legislature, among the first documents adopted by the Lithuanian parliament was the official proposal for the Soviet Union to start negotiations "to settle all the problems connected with the restoration of the independence of Lithuania" on the basis of "good political and economic relations with the USSR." In response, the answer given by Gorbachev the next day was as follows: "I think there can be no negotiations; we negotiate only with the foreign states."<sup>32</sup> Until August 1991, the federal acts had always referred to Lithuania as the "S.S.R.," (i.e. still a member of the Soviet Union). The further steps taken by the federal government (an economic blockade, the use of Soviet special troops, etc.) represented punitive acts against the rebels rather than the actions against a sovereign state.

The federal-constituent, rather than the inter-republican nature of the conflict, was stressed when the presidents of the Baltic states and Russia signed a joint statement, the Jurmala Statement on July 27, 1990, and when the President of Russia made an official visit to Tallinn immediately following the Lithuanian massacre of January, 1991. The solidarity was further expressed when Leningrad, (now St. Petersburg) and the second largest city of Russia, sent an official delegation to the Baltic states.

In a situation where a federal power dominates over the constituent state, only one stand remains for the state. It is the stand of legal arguments and the reference to the only available legal option - the right to secede if all the other possibilities have been exhausted. As Stephens put it, the position of United States government on this question under President Buchanan was "strange enough," it "held that the Federal Government had no power to coerce a seceding state to remain in the Union" but at the same time [it] held that no State "could rightfully withdraw from the Union."<sup>33</sup> The argument for the latter is not extremely evident; however, Buchanan's entire position was not only innocently "strange," but also politically dangerous. The recognition of the act of secession could open the doors to novel, natural, and peaceful integration.

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30. *Id.* at 364.

31. *Id.* at 356.

32. The Record of the 3rd Congress of People's Deputies of the USSR, vol. 3, at 4 (1990).

33. 2 STEPHENS, *supra* note 27, at 34.

Ignoring those problems actually meant only the continuous escalation of the crisis. Mere denial of massive separatism does not annihilate it.

#### IV. THE RIGHT TO SECEDE

Until the scope of a federal government's jurisdiction is unequivocally settled, the federal composition of a state is more than a legal-technical rudiment or historical anachronism, (i.e. if they are not, to use Kux's words - "unitary federal states").<sup>34</sup> Furthermore, the real federation remains a political problem, and the right to secede exists independently of its being explicitly stated (as in art. 72 Const. USSR). This may be concluded from the derivative nature of a federation itself. As Alexander Stephens, the Vice-President of the Confederacy stated:

The Federal Government itself possesses no Right, and is intrusted [sic] with the exercise of no Power, except by delegation from the Sovereignty of the several States. Sovereignty itself, as we have seen, is, from its very nature, indivisible! There never was a greater truth, more pointedly uttered than by Mr. Jefferson, that the States of this Union "are not united upon the principle of unlimited submission to their General Government."<sup>35</sup>

Paradoxically, no one in the Soviet Union who had represented federal interests had ever denied the voluntary character of the Union itself. Even if we ignore the violent unification of some republics into the Soviet Union (Georgia, Moldavia, and the Baltic states), the argument derived from the voluntary character of that union still remained. It meant that the sovereign rights of republics did not cease to exist after they became members of the Union. Even if they did not exercise their sovereignty to the fullest extent, they still possessed the specific legal status at least as potential sovereigns, and had the right to withdraw all their jurisdiction from the Union. This initial sovereignty was recognized fully in the treaty between the American Colonies and Great Britain signed September 3, 1783. In the treaty, the British Crown transferred its legal sovereignty to all of the colonies, *each of which* was named and recognized as a "free, sovereign and independent state."<sup>36</sup>

The constituents' stand against federalism is primarily legal in that they initiate political discussion and insist on negotiations using mainly legal arguments derived from the nature of the federal composition of the state. It goes without saying that these arguments favor constituents rather than the centralistic federal powers which correspondingly tend to choose non-legalistic forms of settlement.

As Zbigniew Brzezinski correctly stated, "Quite unintentionally, Gorbachev's emphasis on greater legality - so necessary for the revival of the Soviet economy - gave the non-Russians a powerful weapon for contesting Moscow's control over their destiny."<sup>37</sup>

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34. KUX, *supra* note 28, at 8.

35. 2 STEPHENS, *supra* note 27, at 668.

36. Definitive Treaty of Peace, Sept. 3, 1783, U.S.-Gr. Brit., art.1, in 2 TREATIES AND OTHER INTERNATIONAL ACTS OF THE UNITED STATES OF AMERICA, 151,152 (Hunter Miller, ed.)(1930).

37. Zbigniew Brzezinski, *Post-Communist Nationalism*, 68 FOREIGN AFFAIRS, 7 Winter 1989.

The same was the case in mid-19th century America. Confederate government in America was:

far from engaging in revolution, it was taking the most ancient rules and giving them a literal interpretation, and everything that it did would be done in the strictest observance of those rules. Its very existence was justified by the belief that the states which composed it had a legal and moral right to do what they had done. It was this government's first article of faith that it was completely and eternally Constitutional. . . .<sup>38</sup>

The stand of Baltic states was the same. Adopting the Declaration of Sovereignty on Nov. 16, 1988 the Supreme Soviet of Estonia did nothing more than restate article 76 of the Soviet Constitution and derive the inevitable consequences of that statement. But because of the self-contradictory character of the Soviet Constitution, some of the developments of this statement created direct contradictions with other articles of the same Constitution.<sup>39</sup>

For the first time in Soviet history, the declaration restored the definition of sovereignty under Soviet law. Until November of 1988, no definition existed. Sovereignty was defined as "the supreme power over given territory"<sup>40</sup> which also meant that a republic's laws are superior to federal laws. The opposite statement would contradict the idea of sovereignty itself. The sovereignty that has only the right to create the inferior laws ceases to be the supreme power, i.e. to be sovereignty at all. This contradicted article 74 of the Soviet Union's Constitution.

The same contradiction also appeared in the American case. It is irrelevant that sovereignty in its proper sense was not mentioned in the federal Constitution itself, it was assumed at least by some of the States and this assumption contradicted the "supremacy clause" of the U.S. Constitution. The question of rightful "claims of . . . any particular State" (sec. 3, Art. IV, U.S. Const.) included the same problem of which claims were to be considered legal and constitutional.

## V. THE LEGAL ARGUMENTS OF THE PARTIES

The contradictory nature of federalism reflected in the Constitution gives the opposing parties the possibility to refer to the different constitutional clauses and articles. However, because of a federation's supposedly stronger political, economic and military stand, the latter tends to ignore this level of opposition. To represent the entire population, the federal power itself is rather inclined to give up constitutionality than to be bound by constitutional, legal procedure.

In the Maryland case, the federal government had choked off secession by sending in troops, by suspending civil rights, and by standing ready to imprison the state legislature if necessary. In Missouri it made war on the troops of a state which had not seceded and had driven the legal governor off in desperate flight.<sup>41</sup>

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38. CATTON, *supra* note 3, at 390.

39. See, Igor Grazin, *Constitutional Development of Estonia*, 65 NOTRE DAME L. REV. 141, 164 (1990).

40. Compare Stephen's "[S]overeignty itself . . . is, from, its very nature, indivisible.", 2 STEPHENS, *supra* note 3, at 668.

41. CATTON, *supra* note 3, at 415.

In Maryland one of the principal clauses of the United States Constitution, *habeas corpus*, was violated. Replace Maryland with Lithuania and you'll get the Soviet case. In the Soviet Union, the independent military commission that investigated the events in Lithuania in January, 1991 managed to prove that it was an attempt of a coup d'état, a military overthrow of lawful government that was coordinated by the highest authorities of the Soviet Union. Strangely enough, at least one scholar in the United States praised this action by the following statement: "We must not equate democracy with the avoidance of force to preserve the [Soviet] Union. Lincoln used force."<sup>42</sup>

Fortunately, the position of Brzezinski, another scholar and outstanding politician, is more rationally grounded. He stated that a "[m]assive national repression in the Soviet Union would affect adversely the process of democratization in Eastern Europe, but also arouse stronger nationalist passions within the region."<sup>43</sup>

In the course of the American Civil War, both the spirit and the letter of the Constitution was violated. President Lincoln's "Emancipation Proclamation" of Jan. 1, 1863 was in direct contradiction with the section 2, article IV of the United States Constitution. Those violations became possible not because of the legal strength of the arguments behind the violations but because of the political and military possibility to protect them.<sup>44</sup>

Extra-constitutional measures to solve the federalist conflicts had also been used by the USSR. Massive use of military force was given in January, 1990 just a year before the bloody events in Latvia and Lithuania, in the capital of Azerbaijan, Baku. Using as a pretext some former inter-ethnic conflict, the Soviet Union introduced martial law on January 20, 1990 and hundreds of people were killed and tens of political leaders were arrested.<sup>45</sup> It was aimed at interrupting the forthcoming elections to the republican parliament where it was probable that the vast majority of seats would have been gained by the non-Communist popular movement. A similar type of extra-constitutional action is also, to some extent, similar in the United States. Just as the United States federal government introduced a naval blockade against the Confederate States during the course of

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42. Jerry Hough, *SOVIET DICTATORS AND DEMOCRATS*, WASH. POST, Feb. 17, 1991 at C1. This analysis must not be taken too seriously. It is based on a lack of factual evidence. The claim about the economic reforms simply ignores the fact that there have been no economic reforms under Gorbachev whatsoever. Hough's primary position of real democracy for some and Communist unitary state for others is extremely suspicious from an ethical point of view.

43. BRZEZINSKI, *supra* note 37, at 3.

44. This contradiction was later abolished by the thirteenth amendment as one of the legal consequences of the Civil War.

45. The Moscow special envoy sent to Baku Jevgeny Primakov (later - Gorbachev's envoy to Saddam Hussein in February, 1991) confessed that the military action was inspired not by the non-existing civil disturbances but to avoid the secession of Azerbaijan that must be canceled at any costs." *Materially k tragedj v Baku* [Material Regarding the Tragedy at Baku], 1990 at 28 (materials published for the Supreme Soviet by Azerbaijani Deputies).

The casualties of that action ordered by the federal authorities amounted to 160 people killed by soldiers, at least 140 squashed by tanks and armored vehicles, and more than 400 people wounded.

The independent military commission that investigated the events in Lithuania in January 1991 wrote in its conclusion: "The USSR President cannot claim ignorance of the planned joint actions by the Soviet Armed forces, internal troops. . . Such actions could not be carried out without his personal permission." Committee Report, *The Shield*, Feb. 11, 1991, at 1.

war, the Soviet Union did the same against Lithuania in April 1990 without any sort of recognition of that republic as an international legal entity.<sup>46</sup>

It may be said that the federal government is the last one who is ready to recognize the sovereign rights of constituent states and if the states did not succeed to involve the federal government in the process of legal arbitration, the federal power has the extra-legal means to preserve its own interests.

## VI. FEDERAL PROPERTY ON CONSTITUENT TERRITORIES

In both cases, the primary means to achieve federal goals against secessionist policy was the federal property located in the constituent territories and under the control of the federal government. Federal forts in the United States territorial waters and the events at Fort Sumter during 1861 reveal all the political and legal backgrounds of the problem. Theoretically, as the means in the hands of Federal Government the U.S. forts constituted the joint property of all the states which had to be managed in their common interests. At the same time they were located on the territories of the states, (i.e. finally they were under the jurisdiction of state's sovereignty), especially in the case when they could be used *against* such a sovereignty. Speaking about the case of Fort Sumter, Alexander Stephens stated:

The title, therefore, of the United States to the land on which Fort Sumter was built, was in no essential respect different from the title of any other land-holder in the State. The tenure by which the United States claimed and held this property, differed in no essential respect from the tenure by which every other land-owner held similar property in the State; nor was this property of the United States, so purchased and held under grant from South Carolina, any less subject to the right of Eminent Domain on the part of the State, than any other lands lying within her limits. If this was so even before Secession, (and no one can successfully assail the position), then how much more clearly this right (by virtue of the principle of Eminent domain), to demand the possession of this property for public use, for her own protection, appears after she had expressly resumed the exercise of all of her Sovereign powers? This right to demand the possession of this Fort, therefore, being unquestionably perfect in her as a Sovereign State after Secession, whether it was before or not, she had transferred to the Confederate States. Hence, their right to demand the evacuation of Fort Sumter, was perfect, viewed either morally, or politically.<sup>47</sup>

The federal mechanism of a federal state provides the means to express the political will that is given to a constituent state. In the United States, it has been the equal representation of states in the U.S. Senate and the exhaustive list of federal jurisdiction in Article I of the U.S. Constitution. It is much more than had been given to republics in the Soviet Constitution where the Congress of People's Deputies was based mainly on proportional representation; its jurisdiction is discretionary; and the Chamber of Nationalities of the Supreme Soviet did not

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46. In the case of confederate states, Lord Russel, the British Foreign Minister, made a hint that they can probably be recognized at least as a belligerent party. But in this case, it is not evident in whose favor this recognition was given. The recognition of United and Confederate states as belligerent made the naval blockade internationally valid too.

47. 2 STEPHENS, *supra* note 27, at 42.

hold the specific powers invested in the U.S. Senate. Even these means proved not to be enough to protect the sovereign rights of the States when they were considered violated (or were considered to be *potentially* violated) by the federal power. The problem which arises here is what can a constituent state do, if its voice in the federal assembly is too weak to be heard and the assembly still passes the law that evidently violates the rights of this particular state. To whom does the last word belong now?

It may be assumed that none of the constituent states have ever joined any union with the intention of damaging its own interests. If the fact of joining the union becomes evidently harmful the constituent state obtains the right to "call back" its sovereign rights and restore its sovereignty over the territory that is covered by its legal title. It is also in the "course of human events" when it becomes necessary for one people to dissolve the political "bands which have connected them with another." In this sense, the joint property of all the members of a federation is not based on the absolute equality of all proprietors. Rather, it is based on a privileged position of one of them - the privileged sovereign of this territory. If the state does not have any other privileges, it at least has the privilege to secede and to take its territory with it.

The problem of "giving up" the federal property that may form the material foundation for the restored sovereignty of the constituent states also appeared in the Soviet Union. It is enough to mention the tragic events in Latvia and Lithuania which were initiated by the special federal troops seizing the Publishing House in Riga and the television tower in Vilnius.<sup>48</sup> This was an extreme case. However, another Soviet "Fort Sumter" happened more quietly, and its consequences were to some extent similar to the original one. On November 27, 1989, the Supreme Soviet passed, by a narrow margin, a law that had to provide some kind of economic self-management for the three Baltic States. Besides other clauses, the law provided some possibilities for the transformation of federal property under the authority of those republics. The adoption of the law did not induce any motions from the federal part until the time came to carry out these transformations. Then the Deputy Prime-Minister of the Soviet Union issued the order (No. 1045P, July 2, 1990) to integrate all the enterprises that were transferred to the republics into a new federally owned concern which would pay the tax revenues directly into the federal budget. The result was almost identical as the result in Fort Sumter; all possibilities for negotiations were canceled. The subsequent events amounted to economic war and intense political confrontation.

## VII. TERRITORIAL DISPUTES

The determined territory is perhaps the most important legal precondition

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48. In the Vilnius case this statement was not correct: Television communication facilities were managed by the Ministry of Communications that were not a federal, but "federal-republican" facilities. So it could be with the republican authorities as well.

The Riga publishing-house case was more federal but also not a legally absolutely valid one. From the formal point of view all the major publishing houses, printing equipment and even paper belonged to the C.P.S.U. - the federal political party. So the troops that are officially under the control of a state were used in this case to protect the property of an unitary Communist Party, i.e. technically - private property and from a legal point of view - a civil case.

of state sovereignty. Without a territory or with amputated territory there are no objects over which the sovereignty can be exercised. This is one of the reasons why the federal powers in the case of conflicts tried to destruct the territorial structure or territorial integrity of constituent states. The efforts to create some extra-territoriality for the federal property is just a part of the problem. To some extent this is a matter of policy and military strategy, but it is not only that. The considerable changes in territory create new problems of determining who is the sovereign and to what extent. If the territorial changes are vast ones it can be stated that the former sovereign who joined the union has ceased to exist and the corresponding claims cannot be legally and politically validated. These efforts have never been groundless - as the federal and secessionist claims exist in a parallel way on the same territories (Washington D.C. excluded) the constituent states themselves may be (and often are) split between these two political positions that objectively favor the federal government who has the opportunity of a nation-wide unification of its supporters.

The most typical case in the United States was the Commonwealth of Virginia which split into two camps along geographical lines: the federalists and confederalists. As Catton explains:

The federal government, now would calmly break a state in half, turning to its own advantage a hump-backed act of secession which was even more irregular than the original act of secession which Washington was fighting to suppress. It was giving the war a shape - this early, with serious fighting not yet begun - which would make a compromise peace, a settlement by negotiation, all but impossible.<sup>49</sup>

The same action in the eastern counties of Tennessee was taken not because of the lack of proper will but because of the inability of the federal government to provide necessary assistance to the potential new state.

I am not competent enough to launch a discussion on the spiritual and material foundations that caused such a political polarization in the framework of separate states in the United States. But as far as the U.S.S.R. is concerned I can firmly state that there are certain fairly evident political and economic foundations for the Unionist sentiments in generally independence-minded republics. The results of a totalitarian national policy with all its mass deportations, forced and violent migrational moves, administratively commanded economy, and tremendous disproportionality between different parts of the economy, has created a situation where 60-80 million people, up to approximately twenty-five percent of the population, no longer live, in their home republics. The nature of their social position and economic activities had made them objectively dependant on the preservation of the Soviet system. Furthermore, since there is no place for national sentiments, their status as constant migrants has reinforced their "all-Union" mentality.<sup>50</sup> This is a group of people where the Brezhnev Constitution of the U.S.S.R. has, unfortunately, been to some extent correct. These

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49. CATTON, *supra* note 3, at 415.

50. A worker who has come to work in a defense-oriented factory that is of no use for the republic will loose his job when the Soviet Union is dissolved. An engineer or manager whose career has been dependent on political loyalty rather than professionalism is not needed when the C.P.S.U. is not in power anymore, and the republican movement is anti-communist in its political essence.

people are the "Soviet people." Although they are a minority in the republics, these people were used as a pretext for anti-republican actions by Moscow federal powers. Introducing special punitive forces into the Baltic states was officially carried out "on the request" of some anonymous Salvation Committees of pro-Union political groups which pretended to defend the interests of these people.

For a long time it had been Gorbachev's firm claim that the popular movements in the republics do not represent the majority but are a relatively small group of political extremists.<sup>51</sup> Interestingly, President Lincoln made the same mistake:

It may well be questioned whether there is, today, a majority of the legally qualified voters of any State, except perhaps South Carolina, in favor of disunion. There is much reason to believe that the Union men are the majority in many, if not in every other one, of the so-called seceded states.<sup>52</sup>

The parallel between the United States and the Soviet Union goes much further. In his message to the 37th Congress of the U.S. (July 5, 1861) dealing with the political split in Virginia, Lincoln declared that a group of "loyal citizens" who had proclaimed themselves to be a new government in Western Virginia had to be recognized and protected "as being Virginia."<sup>53</sup> The testimony given by Col. Viktor Alksnis after the mid-January, 1991 events in Lithuania revealed that the initial scenario of a military coup d'état sanctioned by Moscow included the proclamation of the supreme power to be invested in the above mentioned Salvation Committees. This time, the idea failed as it failed later at the national level in August.

Generally, one can conclude that the attitude of federal powers towards alternative governments has been wanting until very recently. It has been so in the case of the "independent Soviet" in Northeastern Estonia, the "republican government" of South Ossetia (Georgia), and the proclamation of "Dniestr Soviet Socialist Republic" in Moldavia. Although not formally recognized, they nevertheless enjoyed the federal government's support.

What is more important than the political realities was the undermining of the territorial integrity of the republics as the material foundation of their sovereignty that was protected by article 78 of the Soviet Constitution and was embodied in the Soviet law itself. On April 3, 1990, the Supreme Soviet of the Soviet Union adopted the law on secession. Without discussing any other provisions of the law, it is important to mention one clause of the law. Section 2, article 3 provided the following:

In a Union republic whose territory includes areas with concentration of national groups that make up the majority of the population in a given locality, the results of the voting in these localities shall be considered separately during the determination of the referendum results.

Although it was vague in its content, the statement clearly expressed the possible consequences. It could lead to the violation of territorial integrity of a

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51. The more than three quarters support for independence given on referendums of Baltic States in February through March of 1991 is the adequate proof just the opposite claim.

52. CATTON, *supra* note 3, at 422.

53. *Id.* at 420.



republic.<sup>54</sup>

The Lincolnian way of handling the problem, (to have Virginia simply divided, though even it was unconstitutional), would be perhaps the most favorable for a republic in the Soviet Union's case.<sup>55</sup> But the law by its intended vagueness *did not exclude* the other option which is to have the vote on an "area with concentration of national groups . . ." as equal to that of other territorial units of a republic.

From what has been already discussed, it becomes evident that the controversies imminent to the federative structure of the state may create, under certain circumstances, a fairly tense political situation that may result in considerably violent actions. Looking back at the eve of the American Civil War I do not want to state that the military outcome of these events was inevitability fatal. However, comparing the events in another country which has a principally different political regime, political culture, and values, one has still to conclude that the federal power is not very anxious to respect the rights of constituent states and that the lack of a proper mechanism of peaceful arbitration of disputes between the federation and its constituents may give rise to fairly dangerous political collisions.

In my opinion Alexander Stephens exaggerated when he equaled federalism ("centralism") and despotism, and when he stated that "there is no difference between Consolidation and Empire."<sup>56</sup> There is only some truth in those words. Nevertheless, if there is no proper way to check on the federal powers, (especially if this federal power at the same time executes the totalitarian regime as has been the case in the Soviet Union), the government evidently tends towards strict centralism, violating the rights of its constituents. The federal powers, unfortunately, are inclined to forget the conditions on which the federation was formed and to identify its own interests with the all-national interests. Although this may be tolerated for a fairly long period of time, the situation itself includes the possibility of a political crisis.

The current trends in the world, particularly in Europe and the post-Civil War history of the U.S.A. have proved the political, spiritual and economic advantages of integration. All of the possible legal claims against the United States' federal government of the mid-1860's are nullified by the further progress of this country. The United States is the best proof of who was right at that time. The creation of a new European Community is proof of the fact that the proper integration favorable to all is possible only if based on real voluntariness and real respect for the economic and political rights and interests of all people involved in that process. Only under these conditions will the advantages of integration, confederalism and federalism prove their validity. Alternatively, preservation of any union through mere force in any form will create waste and unnecessary expenditures.

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54. I'd like to remind the governmental spokesman in the U.S.S.R., who by referring at the Final Act of C.S.C.E. (Helsinki, 1975), took an oath of loyalty to the principle of inviolability of post-World War II frontiers in Europe keeping in mind the integrity of the Soviet Union and excluding the problem of integrity of occupied Baltic States.

55. But even this "favorable" solution was unacceptable for the Baltic states whose legal claims were based on the legal continuity of their sovereignty which had to cover their territorial boundaries too. The undermining of the territorial integrity of Estonia, for example, was executed by the federal act of the Soviet Union that transferred part of Estonian territory to Russia in 1944.

56. 2 STEPHENS, *supra* note 27, at 668-69.

The only real justification for the preservation of the Soviet Union was to create a more effective economic system and a system which better protects human liberties. As the People's Deputy of the U.S.S.R., economist Mikhail Bronstein had repeatedly said, the common market can be the only justification for the existence of the Soviet Union. Unfortunately, this had not been the case. By rejecting any kind of economic reform, and by strengthening the system of authoritarian and administrative power, the federal authorities in the Soviet Union managed only to sharpen their political conflict with the republics. The outcome of this deepening political and economic confrontation was hardly predictable. And though the defeat of the communist junta in August 1991 automatically solved some of these problems, many still remain. One can only hope for the best and rely upon the ability of politicians to acquire lessons from past experience, including the experience of pre-Civil War America.

